IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DATE: 10/8/2012

CASE NO: ~~33212/2003~~ 42590/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

10/8/2012 .....

DATE SIGNATURE

In the matter between:

JIANJUN LI	**1ST APPLICANT**
YUNFEI LI	**2ND APPLICANT**
XIAODONG SONG	**3RD APPLICANT**
HAIQI HAN	**4TH APPLICANT**

JIANZHONG CHENG	**5TH APPLICANT**
LIANGSUO TIAN	**6TH APPLICANT**
YUTAO CAO	**7TH APPLICANT**
JIA LI	**8TH APPLICANT**
ZHONGYING MA	**9TH APPLICANT**
ZHIGIANG ZHANG	**10TH APPLICANT**
XIAMING ZHAO	**11TH APPLICANT**

and

THE SENIOR IMMIGRATION OFFICER PRETORIA	**1ST RESPONDENT**
THE OFFICER IN CHARGE LINDELA REPATRIATION FACILITY	**2ND RESPONDENT**
THE MINISTER OF HOME AFFAIRS	**3RD RESPONDENT**

JUDGMENT

MOTHLE J:

Introduction

[1] This is an application which came by way of urgency in terms of Rule 6(12) of the Uniform Rules of Court, wherein relief is sought for the immediate release of the applicants from a repatriation facility.

Background

[2] The applicants are Chinese nationals who were issued with visitors visa in December 2011 to enter and remain in South Africa for ninety (90) days on invitation by a company known as PMG, trading in the mining industry. The third applicant, who is also a Chinese national, arrived in August 2011 under the same conditions and visa issued by the South African Embassy in China ("the embassy").

[3] With regard to the third applicant, on the eve of the expiry of the 90 days visitors visa in November 2011, he applied for an extension of that visa. Similarly, the other 10 applicants applied for extension of their visas in South Africa a day before their expiry in March 2012.

[4] The Department of Home Affairs ("the department") declined the applications for extension of visa on the 21st April 2012. The applicants however remained in the country. In response to an email inquiry by the Embassy concerning the whereabouts of the applicants as their duration of visit had expired, the Chief Executive Officer ("CEO") of PMG informed that the mine was closed and the applicants are loitering in South Africa. On further inquiry regarding their location in South Africa, the CEO by e-mail dated the 18th July 2012, advised that the applicants were based at a hotel called Stay Easy on the East Gate South Boulevard, Johannesburg.

[5] On the 20th July 2012 the immigration officials raided the hotel but could not gain entry into the hotel rooms, until the applicant's legal representative came and on her advice, the applicants opened the doors. The applicants did not have their passports or identity documents with them, at that time. These were later produced by their legal representative. They were then taken to the department's offices in Pretoria for the purposes of establishing or verifying their status in

terms of Section 41 of the Immigration Act 2002, Act 2002 ("the Act").

[6] After verifying with the population register systems, it was then established that the applicants did not have valid legal documents or permits to be in South Africa. The visas they had, had expired and no extension was granted. The immigration officials aver in the respondent's answering affidavit that they then declared the applicants illegal foreigners and as a result, the applicants were detained in terms of Section 34(1) of the Act, for purposes of deportation.

[7] The immigration officer further avers in the answering affidavit that when they attempted to inform the applicants of their rights, the applicants refused to sign the acknowledgment of receipt of the notices informing them of their rights. The legal representative confirms that when they refused to sign, they were acting on her advice. As they were found not in possession of their passports or any form of identification or legal permit, the immigration officials considered them flight risks and they were detained at Lindela

Holding Facility, pending their deportation. During this interaction, the immigration officer avers that the third applicant also acted as interpreter.

[8] The officials thereafter obtained warrants for the further detention of the applicants while awaiting deportation. The applicants then brought this application presently before Court, by way of urgency, demanding their release.

[9] The respondents further alleges in the answering affidavit that prior to the arrest and detention of the applicants, there was communication between the Embassy and the CEO of PMG. This communication concerned the whereabouts of the applicants, when it became apparent that the ninety (90) days for which they were allowed to visit South Africa had expired.

[10] In their affidavits before Court the applicants, through their legal representative, a candidate attorney and deponent to the founding as well as replying affidavits, contended as follows:

10.1 In the founding affidavit, the deponent states that applicants are about to be deported without being granted an opportunity to have their applications for extension of the visas properly considered and if need be, to avail themselves of the appeal or review of that decision;

10.2 In the replying affidavit the deponent avers that the arrest of the applicants was unlawful in that they were not advised of their rights in her presence.

[11] At the hearing of this matter, Counsel for the applicants, Mr Muller SC, argued extensively on the case made out in the replying affidavit. His argument and submissions raised matters of law and for that reason; I will first deal with this aspect of the applicants' case.

The case in the replying affidavit

[12] In regard to the case pleaded in the replying affidavit, Mr Muller SC, argued with reference to the recent Constitutional Court decision in the matter of **Minister of Home Affairs and Others v Emmanuel Tsebe and others, case CCT 110/11**, dealing with the constitutional rights as applicable to illegal foreigners, that the applicants in this case, whether legal or illegal in South Africa are entitled to protection in terms of the Constitution and the laws of the country. The argument goes on further to state that the notice in terms of section 8(1) informing the applicants of their rights was defective and as such, they were not informed of their constitutional rights.

[13] Section 8(1) of the Act provides that an immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision. In the case of a person found to be an illegal foreigner, the review shall be instituted within three (3) days. The "Minister" in this instance refers to the Minister of Home Affairs as defined in Section 1 of the Act.

[14] The Minister, acting in terms of Section 7 of the Act, and under notice No. R616 of 27 June 2005, promulgated Immigration Regulations in the Government Gazette No. 27725 of 27 June 2005. Attached to these regulations are forms including the one referred to in Section 8(1) of the Act as the "prescribed form" to be used by the immigration officials in exercising their various powers. Regulation 5, consistent with the provisions of Section 8(1) of the Act, attaches as annexure "A", **Form 1**, which deals with the exercise of powers contemplated is section 8(1) of the Act.

[15] The notice in terms of the prescribed Form 1 is designed to inform any person who has been declared an illegal foreigner, that he or she may challenge that decision by taking it on review by the Minister, within 3 days. The relevant precise wording of the promulgated Form 1 reads:

B: ***In respect of a person found to be an illegal foreigner:***

To: .....

In terms of Section 8(1) of the Act, you are hereby notified that you may, within three days from date of this notice, request the Minister to review the decision to deport you."

[16] Form 1 then makes provision for the signature of the Immigration Officer, his appointment number, place and date. Further, it makes provision for the person affected, to acknowledge receipt of the original of the notice and to state that he or she understands the contents thereof. To simplify the process the Form ends by stating the following:

> *"I** intend/do not intend to request a review of this decision.*
>
> *My written request is *attached/will be submitted within three days."*
>
> _____ _____
>
> Signature of affected person Date
>
> **Delete A or B, whichever is applicable*
>
> ***Delete whichever is not applicable"*

[17] The essence of the applicants' attack on this Form 1 – notice, which they refused to sign acknowledgement of receipt thereof, is that the Act in terms of section 8(1) makes provision that in the event the

immigration officer makes a decision that a person is an illegal foreigner, then he or she must advise the person affected that he has a right to apply within 3 days to the Minister to review such a decision. The argument goes on to state that when one considers the underlined words quoted text of Form 1 as they appear in paragraph 15 above, the Form 1 refers at the ends to the "**decision to deport you**", which is not the decision taken in terms of, or envisaged in Section 8(1) of the Act. For that reason, Counsel for the applicant contends that the applicants were wrongly advised as section 8(1) of the Act does not make provision for review to the Minister within 3 days, **in regard to deportation.**

[18] To support this argument further, Counsel referred me to **Form 29**, another notice form in the regulations with a title "**Notice Of Deportation**". He argued that the declarations of a person as an illegal foreigner on the one hand and the notice to deport a person on the other hand are two separate processes. According to him, the decision to declare a person an illegal foreigner is provided for in terms of section 8(1) and the decision to deport falls under the category of decisions that are described in section 8(3) read with

section 34(1) of the Act. The section 34(1) process makes provision for appeal (not review) to the Director-General of the department.

[19] Counsel for respondents Mr Bofilatos SC argues, that the deportation is a direct consequence of declaring a person an illegal foreigner. The two processes, according to him, are both applicable with the second being the consequence of the first because the Act provides that where a person is declared an illegal foreigner it is obligatory on the part of the Minister to deport that person. Consequently, the import of this submission is that the reference to "*decision to deport you*" in Form 1 reflects the ultimate conclusion of the process.

[20] It seems to me that the reference to two separate forms (Form 1 and Form 29) in the regulations, support the contention by the applicants that these are two separate processes. However, the one is not necessarily the consequence of the other, as contended for the respondents. The applicants' contention is supported by The Full Court of the Transvaal Provincial Division (TPD) as it was then called, in the matter of **Jeebhai v Minister of**

Home Affairs and Another 2007 (4) SA 294 (TPD) at 302 D. In its judgment, the learned Ngoepe JP, writing for the full court stated thus:

> *"[19] In **Arif Muhamed v Minister of Home Affairs and Others** (TPD case No 41182/05, unreported), Southwood J had to consider a similar application. In particular, the Court had to deal with the contention that s 8(1) of the Act had not been complied with prior to detention for deportation in terms of s 34. The Court found that the procedure in s 8(1) and (2) had to be followed before arrest and detention in terms of s 34. In our view, however, it is not that s 8 always applies; that would depend on the procedure in terms of which the person was brought into s 34. In the present case Rashid came under s 34, at best for him, via s 41, and not via s 8. He admitted that he was an illegal foreigner, admitting all the material facts for that conclusion; for example that he had paid for the documents from an agent. The fact that he was an illegal foreigner was not in dispute; in fact, it was common cause. A decision was then taken to deal with him in terms of s 34(1). He was then advised of his rights, including the appeal and review procedure to the Director-General (the completed form made*

no reference to appeal or review by the Minister; presumably the person would be advised further after the Director-General's decision).

The judgment of Southwood J does not therefore assist the applicant."

[21] By rejecting the decision of Southwood J in **Arif Muhamed v Minister of Home Affairs and Others**, decision, the Full Court accepts that there are two distinct processes between the provisions of section 8 on the one hand and Section 34 of the Act on the other hand and that the former does not necessarily precede the latter. Section 34 may also be preceded directly by section 41 and not necessarily section 8 of the Act. Section 41 provides for a process of interview by an immigration officer or police to establish a person's identity status in the country. Such interview may ultimately result in the detention of such person in terms of section 34 of the Act.

[22] The language in the text of sections 8(1) is clear and unambiguous. It refers only to the decision declaring a person an illegal foreigner. However the prescribed form envisaged in section 8(1) of the Act as

promulgated and published in Form1, provides for the words ***"decision to deport you."*** The decision is made to declare a person as an illegal foreigner in terms of this section. No reference is made in this section to the decision to deport as stated in form 1. The words that should have been stated in the prescribed form in my view are ***"the decision to declare you an illegal foreigner"***, or word to that effect.

[23] I therefore agree with the applicants' contention that the last four words ***"decision to deport you"*** as they appear in the prescribed Form 1 are misplaced, particularly if read in isolation.

[24] However, I do not agree with the submission by Counsel for the applicants that the notice to deport would fall under the decisions referred to in terms of section 8(3) of the Act. Those decisions are subject to either review or appeal to the Director-General. The Notice of Deportation as stated in section 34(1) is also not reviewable, but only subjected to an appeal process. Indeed this is evidenced by the

contents of Form 29, which also provides for acknowledgment of receipt of the notice similar to Form 1 of the section 8(1) notice.

[25] To avoid further ambiguity it will be prudent for the Minister to issue a proclamation in terms of section 7 of the Act, to amend Form 1 of the Immigration Regulations, by deleting the words "***decision to deport you"*** under *B, and substitute them with ***"decision to find you an illegal foreigner" or "decision to declare you an illegal foreigner"*** or words to that effect.

[26] The applicant are thus correct in arguing that the words used in Form 1as described above and read in isolation, can be misleading.

[27] The question which now arises is whether on the facts, in *casu,* the applicant's were not properly notified or advised of their rights in terms of, or as required by section 8(1) of the Act. In this regard, the following are in my view relevant factors to be considered in dealing with this question, namely:

27.1 On advice of the legal representatives, the applicants refused to sign acknowledgement of receipt of the notices. Consequently whether Form 1 is correct or not, they rejected the advice contained therein. In the words of their own legal representative, with reference to Form 1 and Form 29 they "*are not worth the paper it (sic) is written on*"

27.2 On proper construction, the promulgated Form1 notice is not necessarily misleading. The words "*decision to deport you*" at the end are part of a long sentence with a heading. To establish a true meaning of what is conveyed or the purpose sought to be achieved by the notice, one has to consider also the title and the text of the notice, as well as its reference to section 8(1) as a whole. As the title states, the advice to review the decision within 3 days apply "***in respect of a person found to be an illegal foreigner.***" Not a person considered for deportation. The use of the words "decision to deport you" in the Form 1 notice should thus not, in my view, be read and interpreted in

isolation. The words may not only be ascribed their ordinary meaning, but must also be interpreted within the context used.

27.3 The applicants were offered both Form 1 and Form 29. Form 29 refers to the decision to deport and there is no ambiguity there. It advises of the right to appeal to the Director-General. Consequently, both Forms could not have addressed the same subject matter, that is, they could not have introduced two processes, one of review and another of appeal directed to two different officials (the Minister and the Director-General) concerning the decision to deport.

[28] The applicants were offered two separate and different notices. It is my view that had they accepted the notices, which they declined to sign acknowledgement thereof, the notices could not have been so vague as to confuse the applicants and their legal representative. The applicants were always under advice of their legal representative even before their arrest and could not have been (if they had accepted the notices) misled by the text of Form 1. In any event, as I have stated,

the applicants refused to sign acknowledgment of receipt of the notices and consequently they did not receive the advice in the notice. I therefore find that the arrest and detention as executed by the immigration officials on the applicants was lawful.

The case in the founding affidavit

[29] The reasons advanced by the applicants in the founding affidavit for being in South Africa without valid permit are that their applications for extension of the visas were still pending and no decision had been communicated to them. They were also not afforded the right to appeal any decision that could have been taken.

[30] The applicants made their applications for extension of the visas a day before the visas expired, that was on the 13 March 2012. This is common course. A decision was taken and communicated to the company officials in April 2012. The respondents attached to the answering affidavit, as proof, a copy of the decision taken to decline the application for extension of the visas. This letter was addressed to PMG. Further copies of e-mails indicating communication between

PMG and the Embassy, concerning the status of the applicants, were also attached. The applicants' legal representative in her replying affidavit replied thus: "*I cannot comment on the contents of the letter Annexure BC or D* (the e-mail correspondence between the embassy and PMG). *What I can do is to deny that PMG mining failed to inform the applicants (through an interpreter) of the contents of Annexure A.*" This is the letter declining the application for extension. It would be far fetched to hold the respondents responsible for the breakdown of communication between the applicants and their hosts, if what is stated in the replying affidavit is correct.

[31] The applicants' further state that the purpose of visiting South Africa was to have a meeting with the shareholders of PMG. The extension of the visa was sought for that purpose. However the CEO has this to say in his e-mail. "*Please see attached letter of invitation dated16 April 2012. Please be advised that PMG's Bishop Mine is currently closed indefinably (sic) due to non-compliance by some of our Chinese partners. In my capacity as CEO, I would like to know if it is at all possible for these individuals to be requested by the Embassy to*

return to China as soon as possible as they are just loitering around SA due to the mine being closed."

[32] The PMG, who invited the applicants, no longer support the need for them to be in South Africa. In fact, according to the e-mail text above, their return to China is recommended. After the applicants applied for extension of their visas on the 13th of March 2012, according to their version, they enquired about the extension application only on the 13th of July 2012, approximately 4 months later. The applicants thus had ample opportunity during that period while in South Africa, to arrange a meeting with the shareholders, if indeed they were still waiting for the decision on their application. It is also significant that they made enquires from the department concerning their application 7 days before the raid in their hotel.

[33] In the replying affidavit, the legal representative makes an unfortunate remark concerning the section 8(1) and 34(1) of the Act, prescribed forms annexed to the answering affidavit, when she says: "*The documentation referred to in annexure "F1-F11" and "G1-G11" are not worth the paper it is written on.*" The annexures she referred to

are the notices in the form of the prescribed Forms promulgated in the Government Gazette in terms of section 7 of the Act. This remark made by an official of court is inappropriate, considering the facts that the documents as Gazetted, have a legal status. She further denies that the applicants were informed of their rights "in my presence". This is not the requirement of the law. Nowhere in the Act is it provided that the arrestees must be notified of their rights in the presence of their legal representative.

[34] Considering the conspectus of the evidence in this matter, I conclude that this application was merely launched as an attempt to prolong the stay of the applicants in the country. The reasons advanced to justify their illegal presence in South Africa were nothing more than a ruse to achieve this object.

[35] Consequently, I am of the view that this application should fail. In the premises I make the following order:

1. The application is dismissed with costs.

10/8/2012

S.P. MOTHLE

JUDGE OF THE HIGH COURT

For the Applicants

Adv GC Muller SC

Instructed by Van Zyl Smith &Associates Attorneys

Pretoria

For the Respondent

Adv G Bofilatos SC

Instructed by the State Attorney

Pretoria